March 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Prior Testimony.

Insert the following text before the last paragraph on page 112:

The transcript of a guilty plea of an unavailable witness is a "testimonial statement" and is not admissible unless the defendant had a prior opportunity for cross-examination. *People v Shepherd*, 236 Mich App 665, 671 (2004).

The United States Court of Appeals for the Sixth Circuit held that testimony from an investigating officer about information from a confidential informant is precluded under *Crawford v Washington,* 541 US 36 (2004). A "statement made knowingly to the authorities that describes criminal activity is almost always testimonial." *United States v Cromer,* 389 F3d 662, 671 (CA 6, 2004).

Crawford v Washington, 541 US 36 (2004), applies retrospectively to cases pending on appeal when *Crawford* was decided. *People v Bell*, 264 Mich App 58, 60 (2004).

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.41 Statement of Co-Defendant or Co-Conspirator

B. Inculpatory Statements

Insert the following text after the quoted paragraph near the middle of page 115:

Crawford v Washington, 541 US 36 (2004), applies retrospectively to cases pending on appeal when *Crawford* was decided. *People v Bell*, 264 Mich App 58, 60 (2004).

CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.23 Default and Default Judgments

A. Default—MCR 2.603(A)

2. Notice of Default Entry

Effective January 1, 2005, MCR 2.603 was amended. On page 168, replace the first sentence of the second paragraph with the following:

> "Notice that the default has been entered must be sent to all parties who have appeared and to the defaulted party."

B. Default Judgments—MCR 2.603(B)

2. Entry of Default Judgment—MCR 2.603(B)(2) and (3)

Effective January 1, 2005, MCR 2.603 was amended. On page 169, add the following sentence after "b) By Court—in all other cases. MCR 2.603(B)":

> "[T]he party entitled to a default judgment must file a motion that asks the court to enter the default judgment." MCR 2.603(B)(3).

C. Setting Aside Default and Default Judgment

1. Timing

Effective January 1, 2005, MCR 2.603 was amended. On page 169, replace the existing text of this sub-subsection with the following:

> A motion to set aside default judgment must be filed within 21 days after the entry of the default judgment. MCR 2.603(D)(2)(b). However, there is no time limit within which a motion to set aside a default must be filed where the default only has been filed. MCR 2.603(D)(2)(a) and *ISB Sales Co v Dave's Cakes,* 258 Mich App 520 (2003).

CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.24 Summary Disposition

C. Grounds – MCR 2.116(C)

Insert the following text on page 175 immediately before subsection (D):

Effective January 1, 2005, for a two-year period, Administrative Order No. 2004-5 establishes an expedited appeal track for summary disposition motions. Section (3) of the Administrative Order states:

> "If the trial court concludes that summary disposition is warranted under MCR 2.116(C), the court shall render judgment without delay in an order that specifies the subsection of MCR 2.116(C) under which the judgment is entered."

CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.33 Case Evaluation

H. Rejecting Party's Liability for Costs – MCR 2.403(O)

2. Actual Costs

On page 202, after the paragraph beginning "Costs are not awarded," add the following text:

Where the parties agree to arbitration and that mediation or case evaluation sanctions shall apply, the arbitration decision need not be unanimous for mediation or case evaluation sanctions to apply. In such a case, the arbitrator's decision is tantamount to a "verdict," and MCR 2.403 does not require a verdict to be unanimous before sanctions may be ordered. *Cusumano v Velger*, 264 Mich App 234, 235-36 (2004).

On page 202 replace the last paragraph before sub-subsection (3) with the following text:

"Actual costs" pursuant to MCR 2.403(O) do not include appellate attorney fees and costs. *Haliw v City of Sterling Heights*, 471 Mich 700, 711 (2005).

CHAPTER 3

Civil Proceedings

Part VI—Post-Judgment Proceedings (MCR Subchapter 2.600)

3.55 Remittitur and Additur

A. Definition

Insert the following text on page 242 before the paragraph beginning "These same factors":

A remittitur amount must be set at the highest amount the evidence will support. MCR 2.611(E)(1); *Palenkas v Beaumont Hosp*, 432 Mich 527, 531 (1989).

CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300–3.600)

3.62 Contracts

C. Parol Evidence Rule and Statute of Frauds

2. Statute of Frauds

On page 255 add the following text to the end of the last paragraph in this subsection:

For a discussion of what constitutes a "note or memorandum of the agreement" sufficient to satisfy the Statute of Frauds, see *Kelly-Stehney & Associates, Inc v MacDonald's Industrial Products, Inc*, *(On Remand),* ___ Mich App ___ (2005).

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.4 Attorneys—Right to Counsel—Substitute Counsel

B. Indigence—Waiver of Fees and Court-Appointed Counsel

3. Appointment of Counsel

Insert the following text at the bottom of page 279 immediately before sub-subsection (4):

When ordering a defendant to reimburse the county for the cost of his or her court-appointed attorney, there must be some indication that the trial court considered the defendant's foreseeable ability to repay the amount ordered. *People v Dunbar,* 264 Mich App 240, 255–256 (2004).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.11 Motion to Suppress Defendant's Statement

C. Evidentiary ("*Walker*") Hearing

1. Voluntary, Knowing, and Intelligent Confession

Insert the following case summary before the text at the top of page 300:

A defendant's Fifth Amendment right to counsel is violated when a law enforcement officer interrogates the defendant after he expressed his desire to speak with an attorney and provided the officer with the attorney's name and telephone number. *Abela v Martin*, 380 F3d 915 (CA 6, 2004). Unlike the circumstances in *Davis v United States*, 512 US 452, 462 (1994), where the Supreme Court concluded that the defendant's statement—"Maybe I should talk to a lawyer"—was "not sufficiently clear such that a reasonable police officer in the circumstances would have understood the statement to be a request for an attorney," the defendant in *Abela* "named the specific individual with whom he wanted to speak and then showed [the police officer] the attorney's business card." *Abela, supra* at 925–926.

Under the circumstances in *Abela*, the Sixth Circuit found that a reasonable officer should have recognized that the defendant was making an unequivocal request for counsel. Once a defendant makes such a request, the rule of *Edwards v Arizona*, 451 US 477, 484–485 (1981), prohibited the police from further interrogation until the defendant's counsel was present or the defendant him- or herself initiated further communication with the police. *Abela, supra* at 926–927.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.14 Double Jeopardy

B. Multiple Prosecutions for the Same Offense

Insert the following text on page 316 immediately before the paragraph beginning **"PPOs and Double Jeopardy"**:

A defendant's murder conviction based on alternate theories of felony-murder and first-degree premeditated murder does not offend the prohibition against double jeopardy, but in such a case, the defendant may not also be convicted of and sentenced for the predicate felony on which the felony-murder charge was based. *People v Williams II*, 265 Mich App 68 (2005).

In *Williams II*, the Court noted that it was bound by the special panel's decision in *People v Bigelow*, 229 Mich App 218 (1998), which required that a predicate felony conviction be vacated when a defendant is convicted of felony-murder. *Williams II, supra* at ___. However, the *Williams II* Court suggested that in cases where it could be determined with certainty that the jury could have convicted the defendant based on evidence of premeditation, the defendant's murder conviction would not rest on his or her conviction of a predicate felony. *Williams II, supra* at ___. In those cases, the Court suggested that the defendant could be sentenced for the predicate felony because that conviction is not required to support any other sentence imposed on the defendant. *Williams II, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

B. Was There a Search or Seizure?

Insert the following text before the sentence beginning "The following instances..." near the bottom of page 334:

When police conduct does not affect a defendant's *legitimate* interest in privacy, the conduct cannot be characterized as a search and therefore, the conduct does not merit Fourth Amendment analysis. *Illinois v Caballes*, 543 US ___ (2005), citing *United States v Jacobsen*, 466 US 109 (1984). Because a defendant can have no legitimate interest in possessing contraband, no legitimate interest is implicated when police conduct reveals only the defendant's possession of contraband. *Caballes*, *supra* at ___, citing *Jacobsen*, *supra* at 123.

An individual who does not submit to an officer's show of authority is not seized, and the Fourth Amendment does not apply to any item the individual abandons during his or her attempt to avoid seizure. *United States v Martin*, ___ F3d ___ (CA 6, 2005). In *Martin*, two police officers saw the defendant trespassing and stopped their patrol car to arrest him. *Martin, supra* at ___. The defendant ran from the officers and as he fled, the defendant discarded a revolver. *Martin*, *supra* at ___. Although the gun resulted from the defendant's conduct after the officers' show of authority, the gun did not result from the defendant's seizure—–lawful or unlawful—because the defendant discarded the weapon before submitting to the officers' show of authority. *Martin, supra* at ___.

Add the following bulleted text and the language following it to the bulleted list on page 335:

- A person is "seized" for purposes of the Fourth Amendment when, in light of all the circumstances, a reasonable person believed that he or she was not free to leave. A consensual encounter may escalate to an investigatory stop and seizure of a person when, based on the totality of circumstances, the officer involved has a reasonable suspicion that the person seized was involved in criminal behavior. *People v Jenkins*, 472 Mich 26, 32–35 (2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

E. Was a Warrant Required?

4. Investigatory Stop ("*Terry* Stop")

Insert the following text after the first paragraph on page 341:

A consensual encounter between an officer and a private citizen does not implicate the citizen's constitutional right to be free from unreasonable searches and seizures. *People v Jenkins*, 472 Mich 26, 32–33 (2005). An initially consensual encounter may become a seizure when, based on the information obtained and observations made, an officer develops reasonable suspicion that the citizen has been involved in criminal activity. Evidence discovered as a result of these legal detentions is properly seized at the time the individual citizen is seized. *Jenkins, supra* at 32–35.

Insert the following text on page 341 immediately before the beginning of sub-subsection (5):

See also *People v Dunbar*, 264 Mich App 240, 245–250 (2004) (contraband was properly seized when it was discovered after an officer lawfully stopped the defendant based on information received from a reliable confidential informant).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation Is Found?

1. Good-Faith Exception

Insert the following text before sub-subsection (2) at the top of page 348:

See also *People v Hellstrom*, 264 Mich App 187 (2004) (officers executing a warrant could reasonably rely on affidavits in support of the warrant based on an officer's experience with similar cases; defendants who assault young females in their home "are known to have items of sexual gratification inside their homes, computers, and other devices").

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.22 Automobile Searches

C. Probable Cause to Search an Automobile

Insert the following text after the second paragraph on page 350:

As long as the initial seizure (in this case, a traffic stop) was lawful and police conduct did not prolong the seizure beyond the time reasonably required to process the traffic stop information, an individual's constitutional protection from unreasonable search and seizure is not implicated. *Illinois v Caballes*, 543 US ___ (2005).

Citing to *United States v Jacobsen*, 466 US 109 (1984), the *Cabelles* Court reemphasized that a defendant can have no legitimate interest in possessing contraband. *Cabelles, supra* at ___. As a result, where police conduct reveals only the defendant's possession of contraband, no legitimate interest in privacy is involved. *Cabelles, supra* at ___, citing *Jacobsen, supra* at 123. According to the Court:

> "[C]onducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy." *Cabelles, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.24 Investigatory Stops

A. "Terry" Stop

Insert the following text after the first paragraph on page 355:

A consensual encounter between an officer and a private citizen does not implicate the citizen's constitutional right to be free from unreasonable searches and seizures. *People v Jenkins*, 472 Mich 26, 32–33 (2005). An initially consensual encounter may become a seizure when, based on the information obtained and observations made, an officer develops reasonable suspicion that the citizen has been involved in criminal activity. Evidence discovered as a result of these legal detentions is properly seized at the time the individual citizen is seized. *Jenkins, supra* at 32–35. See also *People v Dunbar*, 264 Mich App 240 (2004) (contraband was properly seized when it was discovered after an officer lawfully stopped the defendant based on information received from a reliable confidential informant).

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.27 Rape Shield Law

D. Defendant's Failure to Provide Notice

Insert the following text on page 369 immediately before subsection (E):

A trial court cannot refuse to admit evidence of a victim's past sexual conduct solely on the basis of a defendant's failure to provide notice; an inquiry into the circumstances surrounding the failed notice is necessary to preserve the defendant's Sixth Amendment right of confrontation. *People v Dixon*, 263 Mich App 393, 399–400 (2004). In deciding whether evidence for which notice was not properly filed should nonetheless be admitted, a trial court must determine

> "whether the defendant's timing of the offer to produce such evidence suggests an improper tactical purpose, and whether the probative value of the evidence outweighs its prejudicial effect." *Dixon, supra* at 399–400.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.27 Rape Shield Law

E. Evidence of Victim's Past Sexual Conduct

Insert the following text at the bottom of page 370:

Evidence of past sexual relations between a victim and a defendant is not automatically precluded from admission at trial when a defendant fails to comply with the notice requirements of MCL 750.520j. *People v Lucas (On Remand)*, 193 Mich App 298, 303 (1992). The admissibility of such evidence should be determined by the probative value of the evidence and the timing of the defendant's attempt to introduce it. *People v Dixon*, 263 Mich App 393, 399–400 (2004).

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.31 Felony Plea Proceedings

E. Standard of Review

Insert the following language near the middle of page 387 immediately before Section 4.32:

The United States Supreme Court reversed the Sixth Circuit's decision in *Tesmer v Granholm* but did not address the constitutionality question because the Court concluded that the plaintiffs lacked standing to challenge Michigan's procedure on behalf of "hypothetical indigents." *Kowalski v Tesmer*, 543 US ___ (2004). However, *Halbert v Michigan,* ___ US ___ (2005), a case in which the Supreme Court granted certiorari, is pending; *Halbert* involves a "real" plaintiff posing the same question raised in *Kowalski*. Until *Halbert* is decided, the controlling rule in Michigan is that set forth in *People v Bulger*, 462 Mich 495 (2000)—Michigan's Constitution does not require that indigent defendants be appointed counsel to pursue discretionary appeals.

CHAPTER 4
Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.35 Withdrawal of a Guilty Plea

G. Appealing a Guilty Plea

Insert the following after the two lines of text at the top of page 395:

The United States Supreme Court reversed the Sixth Circuit's decision in *Tesmer v Granholm* but did not address the constitutionality question because the Court concluded that the plaintiffs lacked standing to challenge Michigan's procedure on behalf of "hypothetical indigents." *Kowalski v Tesmer*, 543 US ___ (2004). However, *Halbert v Michigan,* ___ US ___ (2005), a case in which the Supreme Court granted certiorari, is pending; *Halbert* involves a "real" plaintiff posing the same question raised in *Kowalski*. Until *Halbert* is decided, the controlling rule in Michigan is that set forth in *People v Bulger*, 462 Mich 495 (2000)—Michigan's Constitution does not require that indigent defendants be appointed counsel to pursue discretionary appeals.

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.48 Jury Instructions

C. Instructions on Lesser Included Offenses

1. Necessarily Included Lesser Offenses

Insert the following text in the paragraph before the last paragraph near the bottom of page 433:

Third-degree criminal sexual conduct (CSC-III) is not a necessarily included offense of first-degree criminal sexual conduct (CSC-I) because it is possible to commit CSC-I without first committing CSC-III. *People v Apgar*, 264 Mich App 321, 326–327 (2004). In *Apgar*, the trial court improperly instructed the jury on CSC-III because the defendant was not charged with CSC-III and CSC-III is a *cognate* lesser offense of CSC-I. *Apgar, supra* at 327. However, the error did not require reversal because the defendant was provided adequate notice of the uncharged offense (CSC-III) when all elements of the offense were proved, without objection, at the defendant's preliminary examination and trial. *Apgar, supra* at 327–329.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

F. Appeal Rights

Insert the following text after the partial quote at the top of page 455:

The United States Supreme Court reversed the Sixth Circuit's decision in *Tesmer v Granholm* but did not address the constitutionality question because the Court concluded that the plaintiffs lacked standing to challenge Michigan's procedure on behalf of "hypothetical indigents." *Kowalski v Tesmer*, 543 US ___ (2004). However, *Halbert v Michigan,* ___ US ___ (2005), a case in which the Supreme Court granted certiorari, is pending; *Halbert* involves a "real" plaintiff posing the same question raised in *Kowalski*. Until *Halbert* is decided, the controlling rule in Michigan is that set forth in *People v Bulger*, 462 Mich 495 (2000)—Michigan's Constitution does not require that indigent defendants be appointed counsel to pursue discretionary appeals.

Michigan Circuit Court Benchbook

Subject Matter Index

Replace page 515 in the subject matter index with the following:

Michigan Circuit Court Benchbook

Appendix

Replace the 14th page of the Appendix with the following list:

FINDINGS OF FACT AND CONCLUSIONS OF LAW – CIVIL

WHEN REQUIRED:

Bench Trial. MCR 2.517(A)(1).

Involuntary Dismissal. MCR 2.504(B)(2).

Non-Standard Jury Instruction. MCR 2.516 (D)(3).

Motion for New Trial or to Amend Judgment. MCR 2.611(F).

WHEN NOT REQUIRED:

Any Motion where not required. MCR 2.517(A)(4).

While always preferable for purposes of appellate review, the trial court is not required to explain its reasoning and state its findings of fact on pretrial motions. People v. Shields, 200 Mich App 554, 558 (1993). See also MCR 2.517(A)(4).

STANDARD OF REVIEW:

A court reviews a trial court's findings of fact for clear error. MCR 2.613(C); In re Stafford, 200 Mich App 41, 42-43 (1993).

A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. Tuttle v. Dep't of State Hwys, 397 Mich 44, 46 (1976).

Michigan Circuit Court Benchbook

Appendix

Replace the 25th page of the Appendix with the following list:

FINDINGS OF FACT AND CONCLUSIONS OF LAW - CRIMINAL

WHEN REQUIRED:

1. Bench Trial. MCR 6.403.
2. Joint Representation of Defendants. MCR 6.005(F)(3).
3. Directed Verdict (reasons required). MCR 6.419(D).
4. Impeachment by Evidence of Conviction of a Crime. MRE 609(b).
5. Sentencing Juvenile. MCR 6.931(E)(5).
6. Probation Revocation. MCR 6.445(E)(2).
7. Post-Appeal Evidentiary Hearing. MCR 6.508(E).

WHEN NOT REQUIRED:

Any motion where not required.

There are motions that require the court to explain its conclusion without specifically requiring findings of fact and conclusions of law. For example, when ruling on a motion for new trial, "[t]he court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record." MCR 6.431(B).

While always preferable for purposes of appellate review, the trial court is not required to explain its reasoning and state its finding of fact on pretrial motions. People v. Shields, 200 Mich App 554, 558 (1993). See also MCR 2.517(A)(4).